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No. 88-117

Supreme Court, U.S.
FILED
AUG 12 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the

Supreme Court of the United States

OCTOBER TERM 1987

Tony and Susan Alamo Foundation, Inc. ..... *Petitioner*

v.

Charles D. Ragland, Commissioner of the Department of Finance and Administration, and the State of Arkansas, Department of Finance and Administration ..... *Respondents*

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

RESPONSE OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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STATEMENT OF THE CASE

The Respondent, Charles D. Ragland, Commissioner of Revenues, Department of Finance and Administration for the State of Arkansas, is responsible for the administration of the Arkansas Gross Recepits (Sales) Tax. The Petitioner, is a non-profit corporation under the laws of the State of California authorized to conduct its affairs as a non-profit corporation in the State of Arkansas. The Petitioner operates six for profit businesses: 1) the Alamo of Nashville in Alma, 2) the Alamo Restaurant, 3) Alamo Country Store & Fruit Stand, 4) the Alamo Kerr-McGee Gas Station, 5) the Alamo DX Service Station, and 6) Alamo Auto Repair & Transmission. Profits

derived from these businesses are utilized by Petitioner to support itself, its Associates or members, and its ministry. All six businesses applied for and received Arkansas Retail Sales Tax Permits. These permits enabled the six businesses to purchase items for resale without initially paying the Arkansas Gross Receipts Tax. All six businesses thereafter charged, collected and remitted Arkansas sales tax on all sales made to individuals or businesses not connected with Petitioner. An audit of Petitioner's businesses was conducted for the period September 1, 1977 through August 31, 1980. The Respondent assessed tax against Petitioner on the value of transfers of various foods, clothing, gasoline, auto repairs and other items made to Petitioner's members or itself. Specific taxable transfers included: (1) charges for parts and services from the Alamo Auto Repair and Transmission for repair to Petitioner's vehicles; (2) distribution of various foodstuffs from the Alamo Country Store and Fruit Stand to employees of Petitioner; (3) clothing delivered by Alamo of Nashville to employees of Petitioner; (4) transfer by the Alamo DX Service Station of tires, batteries, and other auto accessories to Petitioner's businesses; (5) delivery of food for consumption by Petitioner's employees from the Alamo Restaurant; and (6) sales of convenience store items such as cokes, candy, sandwiches, belts, hats, etc. to Petitioner's employees by the Alamo Kerr McGee Gas and Quickie Market. Respondent imposed tax liability on two theories: (1) goods or services transferred by the Petitioner to its members were sales as defined by the Arkansas Gross Receipts (Sales) Tax and (2) the transfer of tangible personal property from Petitioner's businesses to a member was a withdrawal from stock under the same law.

SUMMARY OF ARGUMENT

A.

The six businesses operated by the Petitioner are not exempt from taxation under Arkansas law where the church or charitable organization is engaged in business for profit. By making application for and obtaining a sales tax permit allowing the tax free purchase of merchandise for resale, Petitioner's businesses were engaged in business for profit. Transfers of food, clothing, and other items to Petitioner's Associates are sales or withdrawals from stock and therefore taxable under the Arkansas Gross Receipts (Sales) Tax.

B.

The Arkansas Legislature has wide latitude in adopting tax laws and exemptions therefrom. The taxation of commercial businesses operated for profit by Petitioner is a legitimate exercise of the power to levy taxes.

C.

This Court has previously considered Petitioners arguments that governmental imposed record keeping requirements for its commercial activities infringes on Petitioners rights under the 1st Amendment Free Exercise of Religion Clause and rejected the same. *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985), at page 303.

REASONS FOR DENYING THE WRIT

A.

THE ARKANSAS GROSS RECEIPTS TAX ACT WAS CONSTITUTIONALLY APPLIED TO THE ALAMO FOUNDATION'S COMMERCIAL BUSINESS ENTERPRISES. TRANSFERS OF FOOD, CLOTHING, AND OTHER ITEMS TO ASSOCIATES ARE SALES OR WITHDRAWALS FROM STOCK AND PROPERLY TAXABLE UNDER ARKANSAS LAW.

The State of Arkansas has imposed a sales tax under Ark. Code Ann. §26-52-401(2) (1987) upon churches engaged in business for profit. The statute provides:

> Exemptions for various products and services.
>
> > There is specifically exempted from the tax imposed by this Act the following:
> >
> > 2) the gross receipts or gross proceeds derived from the sale of tangible personal property or services by churches, except where the organization may be engaged in business for profit;

Further, a business in the State of Arkansas is liable for taxes on withdrawals from stock. Ark. Code Ann. §26-52-103(a) (4) (1987), subjects a business to sales tax, on:

> " . . . The value of any goods, wares, merchandise, or property withdrawn or used from the established business or from the stock in trade of the established reserves for consumption or use in such business or by any other person."

The Alamo Foundation carries on commercial activities by operating the six businesses involved in the present litigation and others in the State of Arkansas. (See *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471

U.S. 290 (1985), at page 292). These businesses are organized and operated to generate revenues which are used to foster and continue the religious purposes of the corporation. The Arkansas Legislature, for whatever reason, chose to limit the tax exemption available to a church by requiring the church not be engaged in business for profit. Petitioner's businesses are engaged in business for profit, removing them from the tax exempt status they might otherwise be entitled to under Arkansas law.

The United States Supreme Court in the case of *United States v. Lee*, 455 U.S. 252, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982), followed several principles applicable here. The Court stated:

> "Not all burdens on religion are unconstitutional . . . the State may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest." (455 U.S., at 257.)

Petitioners challenges the constitutionality of the Arkansas Gross Receipts (Sales) Tax scattering allegations purporting to show violations of Freedom of Religion, Equal Protection, and Due Process by the State of Arkansas. Petitioners claims that taxation imposed on its commercial businesses somehow violates its ability to exercise its religion are baseless. The Arkansas tax laws the Petitioner finds offensive don't regulate Petitioners beliefs or interfere with Petitioners right to carry on its ministry at its businesses in Arkansas. Arkansas tax law doesn't impede Petitioner's religious practices. Rather the tax imposed under Arkansas law is justifiable in terms of a legitimate governmental aim.

Petitioner alleges that the application of the Arkansas Gross Receipts (Sales) Tax to its noncommercial internal transfers violates the First Amendment to the U.S. Constitution under the Free Exercise of Religion Clause

and/or the Establishment Clause. Petitioner essentially alleges that the application of the Arkansas Gross Receipts (Sales) Tax will impair its efforts to attract volunteers or impact on unspecified religious freedoms existing at Petitioners commercial businesses. Petitioner's argument evades the key point that there is no impact on Petitioners religious liberty. Even conceding for a moment some minimal burden might exist to Petitioner's exercise of religious freedom in the commercial environment, other compelling governmental interests would sustain the constitutionality of the offending legislation.

In the present case, the overriding governmental interest is the integrity of the Arkansas sales tax system, a factor the Petitioner fails to address. As previously recognized by this Court, a tax system can not function if continually opened to challenges that the tax system somehow infringes on the taxpayers religious belief. (455 U.S., at 260.) Petitioner presents no new issues not previously heard and rejected by this Court. Consequently, the Petition for a Writ of Certiorari should be denied.

This Court previously in examining the religious implications concerning withholding of social security taxes concluded that:

> "Because the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax." (455 U.S., at 260)

The Court finally stated that:

> "When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." (455 U.S., at 261)

The State of Arkansas has a legitimate and overriding governmental interest in maintaining a sound sales tax system. The Arkansas Gross Receipts (Sales) Tax law is rationally related to accomplishing this purpose. It has no impact on Petitioner's religious freedom. The law does, however, impact commercial for profit activities by a church or religious organization which have invaded the market place. As such, it is a legitimate exercise of governmental authority. In *McGowan v. Maryland*, 366 U.S. 420 (1961), this Court stated:

> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the States objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

Petitioner has *voluntarily* entered the commercial business world to make money to support itself. It has *voluntarily* obtained retail sales tax permits to allow it to purchase items for resale and charge tax to customers. Petitioner now seeks to limit the otherwise constitutional application of the sales tax to its Members as an infringement on 1st and 14th Amendment grounds. Under the principles announced in *Lee* and *McGowan*, supra, Petitioners constitutional infringement claims on Freedom of Religion, Equal Protection, and Due Process grounds are without foundation.

It is readily apparent that transfers of various foods, clothing, gasoline, auto repairs, and other items made to petitioner's Associates are sales and therefore taxable

under Ark. Code Ann. §26-52-401(2) (1987). A "sale" for purposes of the Arkansas Gross Receipts (Sales) Tax is, "the transfer of either the title or possession . . . for a valuable consideration of tangible personal property . . . ." Ark. Code Ann. §26-52-103(3)(A) (1987). The transfers in question were sales under this definition even though no money was exchanged between Petitioner and its Associates. This Court in a prior case involving Petitioner reached the conclusion that transfer of money (i.e. salary, wages) was not necessary for an exchange to occur under the "economic reality" test of employment, *Tony and Susan Alamo Foundation v. Secretary of Labor*, 455 U.S. 290 (1985), at 293. A similar result was also reached previously in the present situation by the Arkansas Supreme Court where it was concluded, "the valuable consideration is the exchange of services and goods for the work of the Associates." *Tony and Susan Alamo Foundation v. Ragland*, 295 Ark. 12 (1988), at 15. Applying the rationale of the "economic reality" test to the present constitutional chalienge, no real issue exists that the transfers of goods or services should not be taxable. If for argument, a transfer were found not to exist, a tax liability would still exist under Arkansas law on the theory Petitioner was withdrawing tangible personal property from stock [Ark. Code Ann. §26-52-103(a) (4)].

For the foregoing reasons no constitutional question exists which this Court should address. Consequently, the Petition for Writ of Certiorari should be denied.

B.

THE IMPOSITION OF THE ARKANSAS GROSS RECEIPTS TAX UPON CHURCH BUSINESSES OPERATED FOR PROFIT IS NOT A DENIAL OF EQUAL PROTECTION UNDER THE ARKANSAS AND UNITED STATES CONSTITUTION.

The Arkansas legislature has wide latitude in adopting tax imposition statutes and exemptions therefrom. In *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 79 S.Ct. 437, 3 L.Ed.2d 480 (1959) the Court addressing the denial of equal protection argument advanced by a taxpayer, stated the "rational basis test" to be utilized in reviewing the constitutionality of legislation. The Court said:

> " . . . It has long been settled that a classification, though discriminatory, is not arbitrary nor violative of the Equal Protection Clause of the Fourteenth Amendment if any state of facts reasonably can be conceived that would sustain it." 358 U.S. at page 528.

Under this test, legislation is constitutional if it is rationally related to achieving a legitimate government objective.

In reviewing an exemption from the Alabama Unemployment Compensation Act, this Court further stated:

> "It is inherent in the exercise of the power to tax that a state be free to select the subjects of taxation and to grant exemptions." *Carmichael v. Southern Coal and Coke Company*, 301 U.S. 495, 57 S.Ct. 868, 81 L.Ed.2d 1245 (1931), at 301 U.S. page 509.

In order for the Petitioner to succeed in its constitutional challenge herein, it must prove that the violative law is not rationally related to achieving any legitimate objective of state government under any reasonably conceivable state of facts. As a readily apparent rational basis exists for the imposition of a sales tax on a church operated business for profit (i.e., a valid state objective in collecting revenues and regulating commercial sales), Petitioners legal arguments must necessarily fail. The Petitioner will be unable to show that the offensive legislation is a product of an utterly arbitrary and

capricious government which is devoid of any deliberate and lawful purpose. To this end, there is presented no Constitutional issue demanding review by this Court.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should not be issued to review the decision of the Arkansas Supreme Court and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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